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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDISON ALONZO BALBUENA, Defendant and Appellant.	G043285 (Super. Ct. No. 95HF0776) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Edison Alonzo Balbuena of conspiracy to commit robbery (Pen. Code, § 182, subd. (a)(1); all statutory references are to the Penal Code unless otherwise noted) and second degree robbery (§§ 211, 212.5, subd. (b), 213). The jury also found a principal was armed with a firearm in the commission of the crimes. (§ 12022, subd. (a)(1).) Balbuena seeks reversal for resentencing, contending the trial court erroneously considered convictions occurring after his offense and before trial (a span of some 14 years because he absconded) to impose the aggravated, or upper, term of imprisonment for the offenses, and erred in limiting his presentence conduct credits (§ 4019) under section 2933.1. For the reasons expressed below, we affirm the judgment as modified to correct the award of conduct credit.

I

FACTUAL AND PROCEDURAL BACKGROUND

Around 10 a.m. on the morning of June 21, 1995, two young Hispanic men walked into a Newport Beach jewelry store owned and operated by George Fattal and Aydin Ipek. The men examined diamonds for about 10 to 20 minutes, but left without making a purchase. About 60 to 90 minutes later, the men returned and placed a small deposit for a diamond, and left the store.

Believing the men had been "casing" the store, Fattal left to purchase additional videotapes for the store's surveillance camera at a drug store across the street. Upon his return, another man approached him near the store entrance. The man asked in Spanish for money to call his mother, and requested assistance using a pay phone located about 50 feet away. As Fattal helped him use the pay phone, the man moved to obstruct the owner's view into the store.

Meanwhile, the two Hispanic men who earlier had placed the deposit on a diamond returned to the store. A third man arrived a few minutes later. One of men informed Ipek they wanted a larger diamond. As Ipek started to get it, one of the men walked around the display case and faced Ipek, who turned to see one of the other men seize a diamond box containing 80 to 90 diamonds, worth over $50,000. Ipek lunged at the man as he attempted to flee. The ensuing struggle dislodged the diamond box, scattering the diamonds. The man announced "'this is a holdup'" or "this is a robbery" and pointed a semiautomatic handgun at Ipek's face. Ipek's wife and young daughter arrived just then, and the wife screamed. One of the men, later identified as Balbuena, held the door open while the others decamped. Ipek grabbed one of fleeing men's legs, dislodging a shoe. The gunman brandished the gun outside the store. One diamond, worth $800 to $900 in 1995, was missing.

A bystander saw the man brandishing the gun and watched as he and two or three others ran from the area around the corner of the building. Two cars soon pulled quickly out of the parking lot, including a reddish brown Honda containing the gunman and the others. She followed and recorded the Honda's license plate number.

Ipek identified Balbuena from a photographic lineup. The surveillance video showed Balbuena holding the door open for his accomplices. Police investigators located Balbuena's fingerprints on an interior door handle of the jewelry store.

Following a trial in December 2009, a jury convicted Balbuena as noted above. In February 2009, the trial court sentenced him to a six-year prison term, including an upper five-year term for robbery.

II

DISCUSSION

A. *The Trial Court Did Not Err by Considering Defendant's Subsequent Convictions in Imposing the Aggravated Term*

Balbuena contends the trial court erred when it imposed an aggravated five -year prison term based on his convictions for other crimes occurring after the incident in this case. (§ 213, subd. (a)(2) [second degree robbery "punishable by imprisonment in the state prison for two, three, or five years"].) Balbuena's presentence report described Balbuena's subsequent convictions, including a November 1996 Florida conviction involving a burglary and theft of $27,000 in jewelry, an April 1997 Florida conviction for attempted murder and armed robbery involving a shooting and theft of $150,000 in jewelry, a 2002 Florida conviction for theft of a wallet from a 71-year-old woman, and a 2003 New Jersey conviction for stalking and harassing a jewelry courier. The record also reflects federal arrest and incarceration as a "dangerous deported felon." Balbuena argues consideration of "subsequent convictions violated established policies and principles" of California's determinate sentencing law. We do not find the contention persuasive.

In *People v. Gonzales* (1989) 208 Cal.App.3d 1170 (*Gonzales*), we rejected a claim nearly identical to the one Balbuena urges us to adopt. There, the sentencing court imposed the upper term for voluntary manslaughter based on the defendant's subsequent conviction for a shooting offense occurring years after the charged offense. We rejected the defendant's contention the court erred in using his subsequent conduct to impose the aggravated term: "Gonzales is correct that the 'prior' convictions and prison terms referred to in [former] California Rules of Court, rule 421(b)(2) and (3), are limited

to those occurring prior to the currently charged offense. [Citation.] The judge was not, however, limited to the aggravating factors listed in [former] rule 421, but was free to apply 'additional criteria reasonably related to the decision being made.' ([Former] Cal. Rules of Court, rule 408(a)[; see rules 4.408, 4.420(b)].) One primary objective of the sentencing decision is protection of society ([Former] Cal. Rules of Court, rule 410(a); [see rule 4.410(a)(1)]); Gonzales's subsequent violent conduct indicated a maximum sentence was advisable to serve that objective. . . . These incidents could reasonably be viewed as 'a pattern of violent conduct which indicates a serious danger to society' ([Former] Cal. Rules of Court, rule 421(b)(1)[; see 4.421(b)(1)]). Therefore, unless there exists some flat prohibition against using a defendant's conduct subsequent to the offense to aggravate a sentence, the judge acted properly." (*Gonzales*, *supra*, 208 Cal.App.3d at p. 1172, fn. omitted.)

Balbuena relies on *In re Rodriguez* (1975) 14 Cal.3d 639, 652-653 (*Rodriguez*), which held the Adult Authority could not set the primary term of an indeterminate sentence based on a defendant's conduct occurring after the charged offense. Although some appellate courts had applied *Rodriguez*'s holding to the determinate sentencing law, in *Gonzales* we noted our Supreme Court in *People v. Hovey* (1988) 44 Cal.3d 543, 577-578, had approved the use of a subsequent violent crime as an aggravating circumstance in the penalty phase of a murder trial. And in a noncapital case, our high court in *People v. Redmond* (1981) 29 Cal.3d 904, 913-914, concluded a defendant's perjury at trial and lack of remorse could be used as aggravating sentencing factors. Based on these cases, we concluded a defendant's subsequent criminal conduct may be used as an aggravating circumstance. (*Gonzales, supra,* 208 Cal.App.3d at p. 1173.)

Balbuena argues *Gonzales* "was wrongly decided [or] does not apply to the present action." *Gonzales* has received no criticism in the more than two decades since its publication. Contrary to Balbuena's contention, *Gonzales* considered the purpose of the determinate sentencing law in distinguishing *Rodriguez*. Consequently, we see no reason to deviate from our holding in *Gonzales*. Balbuena's conduct subsequent to the robbery in this case shows a pattern of conduct posing a serious danger to society. The court did not err in relying on Balbuena's criminal conduct subsequent to commission of the charged incident to impose the aggravated term for the charged crimes.[1]

B. *Presentence Conduct Credits*

The parties agreed, and the trial court found, Balbuena served 338 days in custody before sentencing. The court limited his conduct credits to 15 percent under section 2933.1, which provides "(c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person" convicted of a felony offense listed in subdivision (c) of section 667.5 (defining a "'violent felony'").

Balbuena argues, and the Attorney General concedes, nonresidential, second degree robbery was not a violent felony listed in section 667.5 at the time of commission of the offense in June 1995. In 2000, Proposition 21 (Gang Violence and Juvenile Crime Prevention Act of 1998) amended section 667.5, subdivision (c)(9), to

[1] Other factors supporting imposition of the aggravated term included Balbuena's planning and sophistication in carrying out the crime and Balbuena and his cohorts attempt to steal items of great monetary value. (Cal. Rules of Court, rule 4.421(a)(8), (9).)

include all robberies. Accordingly, the trial court erred in limiting conduct credits. We will modify the judgment (§ 1260) to reflect 168 days of conduct credit. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908.)

III

DISPOSITION

The judgment is modified (§ 1260) to reflect defendant is awarded 168 days of presentence conduct credit. The trial court is directed to prepare an amended abstract of judgment, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.